

C. S. McCrossan, Incorporated and Thomas J. Haak. Case 18-CA-7339

February 8, 1983

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS
ZIMMERMAN AND HUNTER

On August 25, 1982, Administrative Law Judge Claude R. Wolfe issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, C. S. McCrossan, Incorporated, Osseo, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² Respondent asserts that its reinstatement of Haak to a position on another project is sufficient to meet the requirement of a full make-whole remedy. Whether such reinstatement satisfies Respondent's obligations under our order is a matter appropriately left to compliance.

Contrary to his colleagues, Chairman Miller would not leave to compliance the question of whether there has been adequate reinstatement. Rather, the Chairman finds merit in Respondent's contention that a reinstatement order is superfluous in the circumstances of this case. In so finding, the Chairman relies specifically on the testimony of Charging Party Haak that he was reinstated by Respondent at another jobsite and that this arrangement was satisfactory to him, and that he preferred not to work under Supervisor Weiss at the I-94 jobsite.

DECISION

CLAUDE R. WOLFE, Administrative Law Judge: This case was heard at Minneapolis, Minnesota, on July 6 and 7, 1982, pursuant to a complaint issued on October 23, 1981, alleging the layoff of Thomas J. Haak to be a violation of Section 8(a)(3) and (1) of the Act, and further alleging an independent violation of Section 8(a)(1).

Upon the entire record and my careful observations of the demeanor of all witnesses testifying before me, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The pleadings establish that C. S. McCrossan, Incorporated, herein referred to as Respondent, is engaged in highway and heavy building construction and meets both the direct inflow and direct outflow standards of the Board for the assertion of jurisdiction. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

International Union of Operating Engineers, Local No. 49, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Chronological Development

At all times material herein Respondent and the Union have been and are parties to a collective-bargaining agreement covering the wages, hours, and working conditions of certain of Respondent's employees, including crane operators. Thomas Haak is a crane operator. The contract provides for the assignment of employees as oilers on certain cranes.

The assignment of oilers to machines had been the subject of several complaints to the Union during the winter of 1980-81. In the early part of 1981, Respondent and the Union had a meeting which resulted in an agreement that the parties would cooperate in monitoring compliance with the contract with respect to the assignment of oilers.

On February 11, 1981,¹ Haak reported to the Union that Respondent was not meeting a contractual provision requiring the assignment of oilers to certain cranes. The following day, the Union's business representative, Allan Roskop, came to the jobsite, which involved work on Highway I-35 at Burnsville, Minnesota. Roskop told David Weiss, Respondent's bridge superintendent, that he must assign oilers to the machines. Weiss agreed to do so, and did. Roskop later returned to the project, and told Weiss and Lloyd Parker, Respondent's contract manager, that if he caught the crane operators working without oilers he would summon them, referring to the employees, before the Union's executive board. Parker told Roskop that the oilers were not needed, and characterized their use as featherbedding. Roskop did not give Respondent the identity of the complaining employee.

Weiss transferred Haak to the Highway I-94 jobsite in north Minneapolis as a crane operator in late February. Weiss continued as Haak's supervisor on that job.

On May 4, Haak again called the Union and advised that Respondent was operating without oilers on the Highway I-94 job. Union Business Representative Dar-

¹ All dates are 1981 unless otherwise indicated.

rell Neilsen came to the site on May 5 about 9 or 9:30 a.m. Neilsen talked to crane operator Stan Anderson who told him he had operated without an oiler the previous day. Neilsen told Stan Anderson that the contract said no operator could operate the machine without an oiler present. When Neilsen arrived, Greg Anderson, Stan's son, was working as an oiler for his father.

While Neilsen was talking to the Andersons, either Stan or Greg said he knew it was Haak who had called the Union because Haak had said he was going to. Weiss joined the group during the conversation, but Neilsen credibly testified that Weiss was not present when Haak was mentioned as the Union's informant. Neilsen did not tell Weiss who had called.

Neilsen told Weiss that every machine had to have an oiler. Weiss agreed to hire oilers, and placed an order with the Union's hiring hall for two who were sent out.

About 3:15 p.m. on May 5, Weiss laid Haak off. Weiss testified that he told Haak there were too many men working and he had to cut down. According to Haak, Weiss told him he was as good an operator as he had, but he had to cut some place. By either version, Weiss was conveying a lack of work as the reason. Haak's work performance is not in issue.

Weiss testified that the only reason he laid Haak off was the fact that Respondent had too many employees, and he had to choose a crane operator to lay off. He explained that the work was winding down, and he had determined before May 1 who would be members of his basic crew to complete the work. Haak was not one of those he selected. Weiss asserts that he picked Haak as the odd man out because Haak had been running the larger cranes, for which there was no more work, until the week before his severance when he started running the small yard crane which he was operating when he was separated. According to Weiss, he concluded it was necessary to reduce the size of his crew following a 9 a.m. meeting of supervisory people on May 5 wherein scheduling for future work was laid out.

Haak was the only crane operator laid off on May 5. Within a few days thereafter,² Weiss hired one Ryan to run a 60-ton crane that Haak had previously operated. When Ryan was terminated at the Union's insistence because he had not been hired through the union hall, Weiss hired one Green to replace Ryan on the same crane until late summer. When Haak was laid off he had operated every crane and was a more experienced operator than others retained at the site. Moreover, some operators retained had come to the Highway I-94 project after Haak had. All crane operators receive the same pay.

Weiss' explanation of the need for a layoff on May 5 is not very convincing. His testimony on the subject is somewhat less than specific and suggests a degree of evasion.³ Assuming *arguendo* that a layoff was necessary,

² Business Representative Neilsen credibly testified to a conversation about a new hire with Weiss within 3 days of Haak's discharge and before a meeting with Charles McCrossan on May 11.

³ The following exchange between Weiss and the General Counsel illustrates the ambiguous nature of Weiss' explanations:

Q. What precisely was the scheduling problem on May 5, 1981, that led you to have [sic] lay off Mr. Haak?

Weiss gives no reason for selecting Haak as the one to be laid off, other than his assertion that Haak was picked because there was no more work for the large crane Haak had been running. This reason cannot be true because Weiss hired Ryan within a few days of Haak's layoff to run a large crane Haak had been running, and Ryan and his successor, Green, ran the same crane until late summer.

Respondent's quarterly tax reports to the Minnesota Department of Economic Security do indeed show fewer total employees than in prior years for the last three quarters of 1981 and the first quarter of 1982, but they also show an increase in the number of employees in the second and third quarters of 1981.⁴ Haak was dismissed in the second quarter, and an increase in total employees over the previous quarter furnishes no support for a need to lay off during that quarter, particularly where, as here, there was an increase of 81 employees in the third quarter. Nor do these records supply any reason for selecting Haak.

Haak complained to the Union about his layoff. Within 3 days thereafter, probably May 7 or 8, Neilsen asked Weiss why he had laid off Haak. Weiss replied that he did not need the crane at the time. They then discussed Weiss' action in hiring another crane operator. I am persuaded they were talking about Ryan. Weiss advised he had a contract right to hire or fire anyone he wanted to. In the course of the conversation Weiss said he would not have Haak back on the I-94 job, but declined to elaborate on his reasons for this position.

Neilsen discussed Haak's termination with C. S. McCrossan, Respondent's owner, on May 11. It was agreed that rather than put Haak together with Weiss again when they were not getting along with each other McCrossan would try to find a crane job for Haak at another of Respondent's locations. Haak went back to work within a week and has been employed by Respondent since, with interruptions during layoff periods. Haak has not worked on the I-94 project since his layoff.

C. S. McCrossan testified that Weiss and Parker had told him over a period of years that Haak was a good operator but hard to get along with. McCrossan does not know specifically what it was that made Haak hard to get along with. He does state, however, that he never considered putting Haak back on the I-94 job because

A. It could have been a number of things right—

Q. (Interrupting) I want to know exactly what it was.

A. It was just that I didn't have a place, I just didn't have a place for him to go to work.

Q. But now you testified that you were having scheduling problems. What was the scheduling problem or don't you recall?

A. It was coordination of after the scheduling was done.

Q. So there was not one specific problem, for example, removal of dirt or something that led to the need to the layoff, it was just basic overall coordination?

A. It changed from day to day.

Q. It changed from day to day?

A. Yes.

Q. Did it change from day to day prior to May 5, 1981, while you were on the I-94 project?

A. Maybe not from day to day, but it had changed. It's changed ever since we've been there.

⁴ The record shows 171 employees in the first quarter of 1981; 216 in the second quarter, and 297 in the third quarter.

Haak and Weiss did not get along, and because McCrossan was told by James Larson, a company contract manager, that Haak had said, while working on a project after his layoff, he did not want to work for Weiss or on the I-94 job. Larson confirms that Haak so told him and this is what Larson reported to McCrossan. Haak states that he told Larson in or about November 1981 he did not want to work for Weiss as long as Larson had other work for him. Haak's version sounds more likely. I do not believe he would choose unemployment over working for Weiss, even though he would prefer to work for others. In any event, neither version of the statement to Larson is relevant to the issue of Haak's termination, and Haak's statement was not a binding waiver of any reinstatement rights he may have.⁶

Weiss avers that several oilers had told him Haak was hard to get along with and they would rather not work with Haak. He states these reports occurred 2 to 4 months before Haak's layoff, but there were none in 1979 or 1980 when Haak worked for him. Weiss was only able to single out one specific instance reflecting on Haak's ability to get along with people. This was an instance in the spring of 1981 when Greg Anderson told Weiss that Haak had told Anderson he was running a crane without an oiler and was a scab like his old man. Weiss neither proffers this hearsay as a reason to lay off Haak, nor does he offer any evidence that he and Haak did not get along.

During the week of May 11, Dale Baysinger, Respondent's foreman,⁶ called Haak to work at Respondent's Center Village project. Haak testified that during this phone call Baysinger said he had heard Respondent was thinking of laying Haak off in February 1981, and "indicated" to Haak that he had been laid off for calling the union hall. On redirect examination Haak modified his testimony to reflect that Baysinger said they might as well throw away the union card if the layoff stands. Baysinger is a member of Local 49. Baysinger's testimony that he did not talk to Weiss or Parker about Haak's layoff or quote them to Haak during the conversation does not readily meet Haak's testimony. I credit Haak that Baysinger said he had heard Respondent had considered laying off Haak in February, but this evidence is far too vague to warrant any imputation of a contemplated unfair labor practice in February. Haak's testimony that Baysinger "indicated" Haak had been laid off for calling the Union impresses me as an unwarranted conclusion drawn by Haak from Baysinger's reference to throwing away the union cards. Baysinger had no part in Haak's layoff and even if I were to conclude he "indicated" as Haak claims, I would find it nothing more than surmise rather than an admission by Respondent.⁷

On July 17, Haak went to the I-94 jobsite where he met with Weiss. Haak first testified that he asked if there was any way he could get a job "with them," and re-

ceived "Absolutely not" as his answer. On cross-examination he clarifies his testimony to reflect that he asked Weiss if he could work for Weiss on the I-94 job, and was told that he could not work there. Haak concedes that he cannot quote Weiss. This latter testimony substantially comports with Weiss' version that Haak asked if it were true he could not work for Weiss anymore, and was told by Weiss that things were going good just as they were. Weiss' answer could reasonably be interpreted by Haak to mean that he could not work on the I-94 project.

Haak then showed Weiss an envelope and other papers, which I conclude were unfair labor practice charge forms, and told him that he was going to file charges. Haak states he then asked Weiss why he had laid Haak off. According to Haak, Weiss answered it was because he was sick of business agents following him around. Weiss denies making this statement, and testifies that Haak asked him if the layoff had anything to do with the business agents being on the job. Weiss avers his answer was, "No."

Neither witness was believable on all topics on which they testified during the hearing, but Weiss was the more certain and believable of the two with respect to this conversation. Furthermore, it is not likely that Weiss would tell Haak he had been laid off because the business agents had been to the job immediately after Haak advised he was filing unfair labor practice charges against Respondent. Weiss' version is credited, and I find that the General Counsel has not shown by a preponderance of the credible evidence that Weiss told Haak he would not be recalled because of his union activities as the complaint alleges.

Haak credibly testified that Project Superintendent Marvin Carlson⁸ called him to report to work running a bulldozer on the I-94 job, commencing the morning of July 20. Haak reported but did not work on July 20 because he was not assigned a machine as were the other operators present. Carlson called Haak the evening of July 20 and told him there was no work. Haak later called Carlson on July 29 and asked why he had not been given work at the I-94 project. Carlson replied that Lloyd Parker had told him Haak could not work on that project.

B. Conclusions in Regard to Haak

Haak has been employed on Respondent's projects off and on since 1964. He became a crane operator in 1968. The testimony of Respondent's witnesses establishes that his work performance has been good, and the fact that Respondent continued to re-employ him over these many years further confirms his satisfactory work history. The only reason advanced by Weiss for selecting Haak for layoff is a lack of work for big cranes. This reason is shown to be false by Weiss' admission that Ryan, and later Green, was hired after Haak's layoff to run the large crane Haak had been operating. The crane was in operation by Ryan within 3, or at the most 4, working

⁶ *Heinrich Motors, Inc.*, 166 NLRB 783, 785-786 (1967).

⁷ Baysinger called employees through the union hall, was the highest authority regularly at the jobsite, assigned work to employees, could assign overtime work, and kept records of employee hours which he signed and transmitted to Respondent's office daily. The record evidence is sufficient to establish he is a statutory supervisor within the meaning of Sec. 2(11) of the Act.

⁸ *Wisconsin Motor Corporation*, 171 NLRB 1431, 1433 (1968).

⁸ C. S. McCrossan testified Carlson was a supervisor in charge grading.

days of Haak's termination, and continued to be operated until late summer. The reason advanced for Haak's selection therefore fails, and the assertion that any layoff was needed on May 5 is singularly unconvincing. Not only is it difficult to believe that a purported lack of work can be cured by laying off one only to hire another, but Respondent's own records show an increase of employees through the third quarter of the year. The failure of Respondent's proof with respect to the selection of Haak, combined with the layoff of Haak in the middle of the workweek and within a few hours of the appearance of union agent Neilsen at the jobsite to investigate the complaint Haak had initiated, suggests cause and effect. I am persuaded that Weiss had strong reason to believe and did believe that Haak had made the complaint about oilers because Weiss knew, from the prior complaint of Greg Anderson, that Haak called him and his father scabs for working without oilers, that Haak was angered by the lack of oilers on the machines. C. S. McCrossan confirms that there have been continued disputes regarding the duties of oilers, including claims of featherbedding, and the statement of Lloyd Parker, in Weiss' presence, to Roskop in February indicates that Respondent was strongly opposed to the assignment of oilers to the cranes. I conclude from Weiss' failure to have sufficient oilers assigned in February and again in May that he shared Parker's views.

Respondent's efforts to show Haak did not get along with other employees, even though this factor was never advanced to him, the Union, or before me as a reason for his selection, strike me as an after-the-fact construct designed to obscure the real reason for Haak's layoff. The only specific instance of anything remotely approaching troublesome behavior by Haak involved his remarks to Greg Anderson. I do not believe that Haak would have been employed time and time again for 16 years, or assigned to the I-94 job by Weiss in February, if his conduct was indeed unacceptable to Respondent. Weiss never gave any evidence of any personal conflict between him and Haak or of any misconduct or poor attitude observed by him. He retained Haak after Anderson's complaint, and there is no showing he ever spoke to Haak about his attitude or behavior. There is nothing in the record to explain why Haak should suddenly become *persona non grata* on the I-94 site after his layoff except his one deviation from the everyday routine. That deviation was his May 4 complaint to the Union, and I am convinced that this statutorily protected act is what made him Weiss' nominee for layoff and excluded him from recall to the I-94 job, notwithstanding others were hired to do the work Haak had formerly performed.

Respondent has carried on seemingly amicable contract relationships with the Union for years, and there is no indication of general antiunion feeling by Respondent. This does not, however, mean that Weiss was not opposed to and did not react to Haak's complaint, and Weiss' conduct is imputable to Respondent. Evidence of animus toward the Union is not necessary to a finding of unlawful termination for resorting to the Union for assistance in enforcing a collective-bargaining agreement.⁹

⁹ See *Mrs. Baird's Bakeries, Inc.*, 189 NLRB 606 (1971).

I conclude and find that Thomas J. Haak was engaged in union and protected concerted activity when he invoked union assistance to secure Respondent's compliance with contract provisions relating to the assignment of oilers.¹⁰ Weiss believed Haak had caused the Union's agent to visit him and require the hiring of oilers, and Weiss then retaliated against Haak by laying him off. By so doing, Respondent, by its agent Weiss, violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By laying off Thomas J. Haak because he engaged in union and protected concerted activity, Respondent violated Section 8(a)(3) and (1) of the Act.

THE REMEDY

In order to remedy the unfair labor practice found herein, my recommended Order will require Respondent to cease and desist from further violations, to post an appropriate notice to employees, and to offer Thomas J. Haak unconditional reinstatement to his former job at the I-94 jobsite, or a substantially equivalent job if his former job no longer exists, and make him whole for all wages lost as a result of his unlawful discharge, such backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).¹¹

In making the recommendation of reinstatement to his former job at the I-94 jobsite, I have considered that that project may be completed, or crane operators may no longer be needed at that site. If either of these contingencies occur the issue of what constitutes appropriate reinstatement in the circumstances shall be a matter to be resolved in compliance proceedings.

Respondent shall also be required to expunge from its files any reference to the layoff of Thomas J. Haak, on May 5, 1981, and notify him in writing that this has been done and that evidence of this unlawful layoff will not be used as a basis for future personnel actions against him.

Pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹²

The Respondent, C. S. McGrossan, Incorporated, Osseo, Minnesota, its agents, officers, successors, and assigns, shall:

¹⁰ See, e.g., *G & M Underground Contracting Co.*, 239 NLRB 78, 80 (1978); and cases cited therein.

¹¹ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

¹² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Laying off employees or otherwise discriminating in any manner with respect to their tenure of employment or any term or condition of employment because they engage in union or concerted activities protected under Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Offer to Thomas J. Haak immediate and full reinstatement to his former job at Respondent's I-94 jobsite, or a substantially equivalent job if his former job no longer exists, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from its files any reference to the layoff of Thomas J. Haak, on May 5, 1981, and notify him in writing that this has been done and that evidence of this unlawful layoff will not be used as a basis for future personnel actions against him.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its jobsites, offices, and facilities copies of the attached notice marked "Appendix."¹³ Copies of said notice, on forms provided by the Regional Director for Region 18, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous

places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT lay off or discriminate against you because you engage in union or concerted activities protected under Section 7 of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you under Section 7 of the National Labor Relations Act.

WE WILL offer Thomas J. Haak immediate and full reinstatement to his former job at the I-94 jobsite or, if his former job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered as a result of our discrimination against him, with interest computed thereon.

WE WILL expunge from our files any reference to the layoff of Thomas J. Haak, on May 5, 1981, and notify him in writing that this has been done and that evidence of this unlawful layoff will not be used as a basis for future personnel actions against him.

C. S. MCCROSSAN, INCORPORATED

¹³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."